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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 1759

ELIASON CORPORATION,
Petitioner,

v.

NATIONAL SANITATION FOUNDATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINION BELOW

The opinion of the court of appeals is reported at 614 F.2d 126 and is printed in the appendix to the petition (1a-10a). The district court's findings and conclusions are not reported but appear at 11a-43a of that appendix.

QUESTIONS PRESENTED

1. Is petitioner entitled to a review by this Court of the findings of the district court, affirmed by the circuit court, that minimal sanitation standards, not claimed to be unreasonable or discriminatory in content or application, did not violate the Sherman Act if promulgated by a private foundation and coupled with testing procedures which resulted in an approval listing and seal evidencing *prima facie* compliance, where all interested parties participated in the formulation of those standards and the charge for testing was reasonable in relation to its costs?

2. Was the court of appeals required to review *de novo* a massive trial record where petitioner had stipulated to submission of the case to the trial court on a paper record and petitioner was allowed three days to summarize and characterize its evidence and to argue its legal contentions to the trial judge?

STATEMENT OF THE CASE

This private, treble damage antitrust case involves the formulation of minimal health standards, covering a broad variety of products, under the aegis of a non-profit private organization, the respondent National Sanitation Foundation (NSF), founded in 1944. Its subsidiary, the National Sanitation Foundation Testing Laboratory (NSFTL), tests products submitted by interested manufacturers and prepares lists of approval and issues seals to those whose products comply with those standards. NSF has promoted the adoption by public health agencies and officers of its

standards and the use of its approval listing or seal as useful evidence of *prima facie* compliance with those minimal standards.

The other respondents include some of the manufacturers who have availed themselves of this NSF program and obtained approval for numerous different kinds of commercial refrigeration equipment (most of which are not competitive with petitioner's equipment) used in food service establishments, the National Restaurant Association, public health officials as a purported class, and nine individuals who are or have been officials with various state and other public health agencies or who have been associated with NSF.

Petitioner, Eliason Corporation, manufactures and sells walk-in coolers and freezers. Virtually all of its sales have been to food stores and supermarket chains such as National Tea and A&P.* Petitioner's complaint focuses on NSF Standard No. 7, which covers sanitation requirements for commercial refrigerators and food storage freezers used in restaurants and other food service establishments. Petitioner alleges that respondents "have engaged in a conspiracy to cause purchasers of products 'which have a relation to or bear on public health and sanitation to refuse to deal with manufacturers of such products who are not approved by NSF, and to refuse to purchase such products which do not carry the seal of approval of NSF,' the 'essence' of that conspiracy being 'to force a boycott' of products not approved by NSF." (11a). Petitioner contends that respondents have violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

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*As found by the trial court, respondents Hobart, Koch, Traulsen and Victory had never heard of petitioner, did not make the same products, and did not sell to the same type of customer or otherwise compete with petitioner (34a).

The trial court found that the NSF seal is promoted merely as *prima facie* evidence of compliance with the NSF standards (32a-34a). While a few public health agencies or officials have required the approval listing or seal, the court found that the evidence fails to show that any significant number have adopted any such requirement as an absolute and that, with at most one exception, even in those few instances installation of unapproved equipment has been authorized after it was tested for compliance with the local sanitation requirements* (35a-36a). The trial judge also found that petitioner has succeeded in selling its products even in those jurisdictions which required compliance with the NSF standards (or even the seal, in those instances where it has been required) (35a-36a).

Based upon the massive record developed over four years of vigorous and detailed discovery initiated by the petitioner, the district court held that, measured by the rule of reason standard, the record fails to show any violation of either Sections 1 or 2 of the Sherman Act. The Court, after its own independent, meticulous review of evidence, followed by three days of detailed oral characterization by petitioner's counsel of that evidence and argument as to the inferences to be drawn from it, concluded as follows (38a-41a):

> (1) The record fails to show that the content of any NSF standard is unreasonable, burdensome or arbitrary and there is no evidence that plaintiff's equipment fails to comply;

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*In its brief to the trial court (p. 387), petitioner conceded that health officials using the NSF seal as a means of evaluating equipment nonetheless "make an independent evaluation of a product if it does not bear the NSF seal."

(2) The record establishes the reasonableness of the procedure for formulating NSF standards in that spokesmen for all interested parties, including any manufacturer who chooses to participate, users or customers, public health officials and sanitation experts, are afforded the opportunity to and do present their views and contribute to the formulation of those standards, so that the interests of one group are not controlling and conflicts are resolved with the participation of all interested parties;

(3) The record establishes the reasonableness of the procedure for adoption of NSF standards in that they can be adopted only upon the vote of the Council of Public Health Consultants, which is comprised exclusively of public health officials who have no commercial or personal monetary interest in the standards or their effect upon any manufacturer;

(4) The record establishes that the NSF standards program is not unduly burdensome, in that satisfactory product performance is an alternative to meeting construction or design requirements, and in that the standards allow competitive innovations and adoption of more efficient and economical manufacturing processes (*e.g.*, Standard No. 7, which would cover petitioner's refrigeration equipment if sold to food service establishments, expressly provides that variations may be excepted and that whenever specific materials are mentioned, alternates may be substituted);

(5) There is no evidence that the equipment of petitioner or any other manufacturer has been

> refused testing, approval listing or the NSF seal on the same, non-discriminatory basis available to other manufacturers, and the fees charged for such services are not unreasonable in relation to the cost thereof and do not pose any practical or economic burden to petitioner;
>
> (6) No respondent has attempted to coerce petitioner to comply with NSF standards; and
>
> (7) No respondent has urged users or other private parties to exclude petitioner's products because they lack the NSF seal or approval, or because such products fail to comply with any NSF standard.

The district court also rejected petitioner's contentions that the respondents have engaged in a group boycott constituting a *per se* violation of the Sherman Act. The trial judge found:

> A major factor leading to the formation of NSF was the existence of conflicting requirements in thousands of local public health codes. To the extent that various jurisdictions maintained varying standards, products had to be manufactured differently for different jurisdictions (19a).

In its conclusions of law, the district court then held that the primary purpose behind the NSF standards program has been pro-competitive in attempting to promote uniform standards among public health jurisdictions, thereby minimizing the number of differing, even conflicting requirements, reducing costs for all manufacturers, and increasing the number of manufacturers able to compete in each jurisdiction

(39a). Based upon its careful analysis of the evidence, the court concluded that "plaintiff has failed to prove any group boycott in *per se* violation of the Sherman Act in that the record demonstrates that the NSF standards program was not established with, nor is it carried on with, any anticompetitive purpose to stifle competition or unreasonably exclude plaintiff or others from competing." (39a).

The trial judge characterized petitioner's position: "Relying upon the personal political and economic philosophy of its principal, plaintiff opposes *all* standards promulgated wholly or in part by private entities and, particularly, any privately conducted testing procedure for compliance which results in a seal or approved listing even though the cost of such testing is reasonable." (37a) (court's emphasis).

The district court, holding that there was no violation of Section 2, concluded that the record failed to establish any relevant product and geographic market, the existence of monopoly power, any specific intent or steps taken to acquire such power, or any dangerous probability of success in obtaining such power (42a-43a).

The court of appeals affirmed, holding that petitioner had failed to show violations of either Sections 1 or 2 of the Sherman Act. It held that neither the standards nor the testing and approval procedures constituted a boycott in *per se* violation of Section 1. Applying the rule of reason, the court concluded that the conduct challenged by petitioner, including the approval listing and seal, was in fact pro-competitive (7a-9a):

> . . . The District Court expressly found that NSF standards were developed to promote

uniformity in the health requirements that products are required to meet in different jurisdictions. This uniformity helps promote nationwide competition and enables manufacturers who elect to comply with NSF standards to be reasonably sure that they will not have to modify their product in order to meet the different requirements of many jurisdictions . . . Many states do not have adequate facilities to properly test whether or not a product complies with NSF health and safety standards. NSFTL's testing program helps to promote uniformity in the interpretation and application of the standards. The fixation of a seal of approval on the product or the listing of the product in a widely distributed publication only further assures the pro-competitive goal of nationwide acceptance of the product. These are all legitimate means of promoting NSFTL's testing service.

Other factors to be considered in analyzing the reasonableness of standard-making and testing programs lead us to the same result. The practice of treating NSFTL approval of a product as *prima facie* evidence of compliance with local standards avoids waste of time and money for duplicative testing in many different jurisdictions. NSF standards are periodically revised so that no product of adequate sanitary quality is excluded from qualifying for the seal of approval. NSF and NSFTL have never disparaged the quality of products which they have not tested. NSF and NSFTL are independent organizations and are not dominated or controlled by manufacturers of

> any one product. They are not in direct competition with the plaintiff and have no intent to exclude plaintiff from competition. We agree with the District Court's holding that no unreasonable restraint of trade was shown by the evidence.

With respect to petitioner's Section 2 claims, the court of appeals ruled (10a):

> We are unable to find any violation of § 2 of the Sherman Act. We are convinced NSF and NSFTL have not exercised monopoly power to exclude manufacturers from any relevant market; that the benevolent powers possessed by NSF and NSFTL are due to their non-partisan performance and the high reputation enjoyed by them and their individual members in the field of public health and sanitation including the objectivity of the test results.

REASONS FOR DENYING THE WRIT

I.

THE HOLDING OF THE COURT OF APPEALS ON THE ISSUE OF SHERMAN ACT VIOLATIONS FOLLOWS THE CLEAR TEACHINGS OF THIS COURT, AND IS NOT IN CONFLICT WITH OTHER LOWER COURT DECISIONS.

This case presents no legal issue under the Sherman Act worthy of review. There is no conflict among the circuits or with the teachings of this Court with respect to the conclusion of both courts below that respondents' conduct is not *per se* illegal under §1 of the Sherman

Act. In claiming that the courts below have erred in their application of the rule of reason, petitioner is asking this Court, contrary to the two-court rule, to review the factual findings of the district court.

The NSF/NSFTL testing program and seal of approval do not fall within the activities which constitute concerted refusals to deal in *per se* violation of the Sherman Act. Exclusionary or coercive acts involving group boycotts, blacklists, or concerted refusal to deal are the keystones of *per se* illegality under the decisions of this court. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600 (1914). The district court found no evidence of any such exclusion, coercion, boycott, concerted refusal to deal, or anticompetitive intent.

The Sixth Circuit followed this Court's decision in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), holding that (6a):

> Where the alleged boycott arises from standard-making or even industry self-regulation, the plaintiff must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable.

The holding of the court of appeals and the district court's determination are wholly consistent with other decisions of this Court and the lower courts. Thus, the courts have consistently held that the group boycott *per*

se rule is limited to just those concerted activities which, lacking any redeeming economic or pro-competitive justification, are intended to eliminate competitors, inhibit their ability to compete or coerce their compliance with an anticompetitive course of dealing. Where such a purpose is lacking and the effect on competitors is therefore only indirect or ancillary to an otherwise lawful main purpose, the challenged conduct is measured by the rule of reason, not the *per se* rule.*

The finding of the district court, affirmed by the court of appeals, was that none of the respondents denied petitioner access to testing in a discriminatory fashion. The district court also found that (39a):

> [T]he record demonstrates that the primary purpose behind the NSF standards program has been pro-competitive in attempting to promote uniform standards among public health jurisdictions, thereby minimizing the number of differing, even conflicting, requirements,

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*Silver v. New York Stock Exch., 373 U.S. 341 (1963); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Board of Trade of Chicago* v. *United States*, 246 U.S. 231 (1918); *Neeld* v. *Nat'l Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Hatley* v. *Am. Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977); *Worthen Bank and Trust Co.* v. *Nat'l Bankamericard Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Bridge Corp. of America* v. *Am. Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); *Roofire Alarm Co.* v. *Royal Indemnity Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963); *Cowen* v. *New York Stock Exch.*, 256 F. Supp. 462 (N.D.N.Y. 1966), *aff'd*, 371 F.2d 661 (2d Cir. 1967); *Deesen* v. *Professional Golfers' Ass'n of America*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).

> reducing costs for all manufacturers, and increasing the number of manufacturers able to compete in each jurisdiction. . . .

Petitioner has failed to show any conflict as to the applicable legal standards. Petitioner has failed to prove conduct falling into long-accepted rules of *per se* illegality under Section 1. In the final analysis, petitioner is challenging only the factual findings of the district court.

Petitioner claims that even if the NSF seal and approval listing is not illegal *per se*, it is an unreasonable restraint of trade under the rule of reason. The lower federal courts have consistently held that a private standards program is not unreasonably restrictive where industry members were found not to be attempting to avoid competition from the plaintiff but were seeking to enhance their industry, where the standard embodied valid distinctions and criteria, where the plaintiff had an opportunity to be involved in the application of the standard, and where it was not applied to plaintiff in a discriminatory, arbitrary or capricious manner. *See: Structural Laminates, Inc.* v. *Douglas Fir Plywood Association*, 261 F. Supp. 154 (D. Ore. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *Roofire Alarm Company* v. *Royal Indemnity Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963).

In *Roofire Alarm*, involving a well-known seal of approval, the plaintiff alleged that Underwriters Laboratories had conspired with the defendant insurance company (which was an active participant in the Underwriters' program) to refuse to test plaintiff's device, thereby inhibiting its marketability. The district

court granted summary judgment to defendant on its denial that it conspired to foreclose plaintiff's device from the market, declaring:

> The action of Underwriters Laboratories Inc. appears to be for lawful and proper purposes. Even if the defendant participates with or through others in the setting of the standards adopted by Underwriters Laboratories, Inc., there is nothing to indicate that this has accomplished any unlawful or improper purpose. Rather, the defendant's connection with Underwriters Laboratories, Inc., and with other related organizations likewise appears to be for lawful and proper purposes. . . . An association formed to foster high standards, to mitigate evils in trade existing through lack of knowledge or information, and to encourage fair competitive opportunities is not to be condemned as an undue restraint of interstate commerce in violation of the Sherman Act merely because it may effect a change in market conditions.

202 F. Supp. at 169. The Sixth Circuit adopted the opinion of the district court in affirming.

Petitioner does not challenge the rule expressed in *Roofire*. It merely contests the district court's findings that the NSF seal and approval listing were not an unreasonable restraint of trade. Those findings, reviewed by the Sixth Circuit, need not again be reviewed and do not warrant granting the petition for a writ of certiorari.

II.

THE COURT OF APPEALS PROPERLY DECLINED TO REVIEW THE RECORD DE NOVO.

There is no rule or case authority which would require the court of appeals to review *de novo* the massive record developed in the trial court. District Judge Joiner reviewed the depositions of twenty-six witnesses as well as thousands of documents. Counsel argued the evidence and the law to the trial court for three days. There is no basis to depart from the "clearly erroneous" standard provided in Fed.R.Civ.P. 52(a) and applied here by the court of appeals.

The court of appeals held that its review of the facts *de novo* would invade the province of the trial court, citing Sixth Circuit cases for the proposition that, even where a paper record is involved, the standard of review is whether the findings of facts of the district court are supported by substantial evidence and are not clearly erroneous. Respondents know of no decision to the contrary.

The cases cited by petitioner as conflicting are not applicable. They invoke the appellate court's *right* to disregard findings where the credibility of a witness is not an issue. There is no obligation upon the appellate court to review the record *de novo*; in fact, the Sixth Circuit has followed the teaching of this Court in using the "clearly erroneous" standard in reviewing a paper record. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960); *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958;

Commissioner v. *Spermacet Whaling & Shipping Co.*, 281 F.2d 646 (6th Cir. 1960). There is neither precedent nor reason for this Court to impose a requirement of *de novo* review upon the courts of appeals.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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